No. 2592

United States
Circuit Court of Appeals
For the Ninth Circuit.

BEN GUIDONI,

Appellant,

vs.

J. H. WHEELER, City Jailer of the Town of Juneau, Alaska,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

[Names and Addresses of Attorneys of Record.]

JOHN RUSTGARD, Attorney for Appellant,
Address: Juneau, Alaska.

HELLENTHAL & HELLENTHAL, Attorneys for Appellee,
Address: Juneau, Alaska.

In the District Court of the District of Alaska, Division Number One, at Juneau.

#1239—A.

BEN GUIDONI,

Plaintiff,

vs.

J. H. WHEELER, City Jailer, of the Town of Juneau, Alaska,

Defendant.

Petition [for a Writ of Habeas Corpus].

Comes now the above-named plaintiff as petitioner and shows to the Honorable Court, as follows:

That this petitioner is a prisoner in the city jail of Juneau, Alaska, and as such in the custody of the above-named defendant, J. H. Wheeler, as City Jailer of said City of Juneau.

That this petitioner is not imprisoned or restrained by virtue of a legal order, judgment or process of a competent tribunal of civil or criminal jurisdiction, or by virtue of any execution regularly and lawfully issued upon such judgment or decree.

That the cause or pretense of such imprisonment or

restraint, according to the best knowledge and belief of this petitioner, is as follows, to wit; that heretofore, to wit, on the 4th day of March, A. D. 1915, this petitioner was, without cause or excuse, arrested and placed in the city jail of the Town of Juneau, Alaska.

That on the 5th day of March, A. D. 1915, a complaint was filed in the Municipal Court of the City of Juneau, Alaska, a copy of which complaint is hereto attached, marked Exhibit 1, and hereby made a part hereof.

That on the said 5th day of March, A. D. 1915, this petitioner, while he was illegally and wrongfully restrained of his liberty by this defendant, was tried for the alleged offense [1*] charged in said complaint, before the Municipal Magistrate of the Town of Juneau, without a jury, and by the said Municipal Magistrate pronounced guilty of the said alleged offense, and sentenced to pay a fine of One Hundred ($100.00) Dollars or to be imprisoned for a term of fifty (50) days.

That said judgment was not filed, recorded or entered by said Municipal Magistrate, and no commitment has been issued under such judgment, as petitioner is informed and verily believes, nor has any warrant been issued under or pursuant to said complaint above referred to.

That at the said trial of this petitioner no witness testified against him under oath or was sworn to testify the truth by any person authorized to administer the oath, nor was any other evidence introduced against the petitioner, nor did the petitioner

*Page-number appearing at foot of page of original certified Record.

admit any guilt or enter any plea of guilty, but that at said pretended trial, the said Municipal Magistrate, as such and not otherwise, administered whatever oaths were administered to any witness.

That the said complaint was not verified or sworn to before any person having authority to administer an oath, nor was any written or verified charge under oath made against this petitioner at or prior to said pretended trial.

That a copy of Section 2 of Ordinance 27 referred to in the complaint, Exhibit 1, hereto attached, is hereto attached marked Exhibit 2, and hereby made a part hereof.

That the petitioner's imprisonment is wholly illegal and without cause or justification in law, in this, that the complaint above referred to is not verified before any person having authority to administer oaths, and that no complaint under oath has been filed or made against this petitioner.

That said complaint does not state facts constituting an offense of any kind or authorizing in any way the arrest or imprisonment of this petitioner. [2]

That the ordinance charged in said complaint to have been violated by the petitioner is null and void and without force and effect, in this, that the Common Council of the Town of Juneau, at the time of the alleged enactment of said ordinance had no authority to enact it or to declare any of the acts therein enumerated a crime or offense punishable by imprisonment or otherwise.

That the common council since the alleged enactment of said ordinance had no authority at any time

to enact it or to declare any of the acts denounced or attempted to be denounced, an offense or crime.

That neither said ordinance nor any law authorized the Municipal Magistrate to impose a sentence of fifty (50) days imprisonment, or any other punishment whatsoever.

That the legality of the imprisonment and restraint of this petitioner has not been already adjudged upon a prior writ of habeas corpus, to the knowledge and belief of this petitioner.

WHEREFORE, your petitioner prays that the writ of habeas corpus will forthwith issue commanding the defendant to produce the petitioner forthwith and to return therewith the time and cause of his imprisonment and restraint before the Court, according to law.

BEN GUIDONI,
Petitioner.

United States of America,
District of Alaska,—ss.

Ben Guidoni, being first duly sworn, deposes and says: That he is the plaintiff and petitioner above named; that he has read the foregoing petition, knows the contents thereof, and that the same is true to the best of his knowledge and belief.

BEN GUIDONI.

Subscribed and sworn to before me this 9th day of March, 1915.

[Seal] JOHN RUSTGARD,
Notary Public.

My commission expires the 14th day of September, 1918. [3]

Let the writ of habeas corpus issue and be made returnable on the ninth day of March, A. D. 1915, at five o'clock, P. M.

ROBERT W. JENNINGS,
District Judge. [4]

Exhibit No. 1 [to Petition—Complaint].

In the Municipal Magistrate's Court, for the City of Juneau, Territory of Alaska, Division No. 1.

CITY OF JUNEAU,

Plaintiff,

vs.

BEN GUDEL (Italian),

Defendants.

Violation Section No. 2 of Ordinance No. 27 of the City of Juneau.

Ben Gudel is accused by E. J. Sliter in this complaint, of the misdemeanor of vagrancy committed as follows: The said Ben Gudel did, in the City of Juneau, in the District of Alaska, and within the jurisdiction of this Court, on the 5th day of March, 1915, and for thirty days prior thereto reside within the corporate limits of the City of Juneau, with no visible means of living, or lawful occupation or employment with which to earn a living, and that during said period the said defendant did wander about the streets of Juneau after the hour of eleven o'clock P. M. without a lawful occupation or business, and during said period the said defendant did wander about the streets of Juneau, without lawful business contrary to and in violation of Section No. 2 of Ordi-

nance No. 27 of the City of Juneau, in the District of Alaska, which ordinance was passed and approved by the Common Council of the City of Juneau the 27th day of July, 1903.

E. J. SLITER. [5]

United States of America,
Territory of Alaska,
City of Juneau,—ss.

E. J. Sliter, being first duly sworn, depose and say that I am the person who executed and signed the complaint in the above-entitled and foregoing action; that I have read said complaint, know the contents thereof, and that the same is true.

E. J. SLITER.

Subscribed and sworn to before me this 5th day of March, 1915.

E. W. PETTIT,
Municipal Magistrate for the City of Juneau. [6]

Exhibit No. 2 [to Petition—Section 2 of Ordinance No. 27].

Sec. 2. All persons within the corporate limits of the City of Juneau who have no visible means of living, or lawful occupation or employment by which to earn a living; all healthy persons who shall be found begging the means of support; all persons who habitually roam about the streets without any lawful business; all idle or dissolute persons who live in or about houses of ill-fame; all persons having no known occupation or business, who shall be found wandering about the streets of the City of Juneau after the hour of eleven o'clock at night, shall be deemed vagrants

and, upon conviction thereof before the Municipal Magistrate of the City of Juneau, shall be punished by a fine of not more than one hundred (100) dollars or by imprisonment in the City Jail of the City of Juneau not more than twenty-five (25) days, or by both, in the discretion of the Municipal Magistrate. [7]

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Mar. 9, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy. [8]

[Title of District Court and Cause.]

Writ of Habeas Corpus.

United States of America to J. H. Wheeler, City Jailer of Town of Juneau, Greeting:

You, J. H. Wheeler, City Jailer of the Town of Juneau, in the District of Alaska, are hereby commanded to produce the body of Ben Guidoni, restrained and imprisoned by you, and certify and return herewith the time and cause of his imprisonment and restraint, before this Court, on the 9th day of March, A. D. 1915, at the courthouse, in the Town of Juneau, District of Alaska, at five o'clock, P. M., to do and receive what shall then and there be considered concerning the person of him, the said Ben Guidoni.

WITNESS the Honorable ROBERT W. JENNINGS, Judge of the District Court, District of Alaska, Division No. 1 thereof, at Juneau, and the

seal of this Court, this 9th day of March, A. D. 1915.

[Court Seal] J. W. BELL,
Clerk.
By John T. Reed,
Deputy. [9]

United States of America,
Territory of Alaska,
Division No. 1,—ss.

I hereby certify that I received the within writ of habeas corpus on the 9th day of March, 1915, at Juneau, Alaska, and thereafter that I served the same on the 9th day of March, 1915, at Juneau, Alaska, by delivering a copy thereof, certified to by J. W. Bell, Clerk District Court Division No. One at Juneau, to J. H. Wheeler, City Jailer of the Town of Juneau, personally and in person.

Dated at Juneau, Alaska, March 9, 1915.

Marshal's fees: $3.00.

Paid by John Rustgard.

H. A. BISHOP,
U. S. Marshal.
By Frank Bach,
Deputy. [10]

[Endorsed]: Filed in the District Court, District of Alaska, First Division, Mar. 9, 1915. J. W. Bell, Clerk. [11]

[Return to Writ of Habeas Corpus.]

[Title of District Court and Cause.]

Comes now the defendant and respectfully submits:

That the Town of Juneau is a municipal corporation duly and regularly organized and existing under and by virtue of the laws of the Territory of Alaska, and as such is possessed of all the rights conferred upon municipal corporations in the Territory of Alaska.

II.

That the defendant is the duly and regularly appointed jailer for said town of Juneau, and that as such jailer, he holds the plaintiff Ben Guidoni in his custody under and by virtue of a judgment duly and regularly entered in the Magistrate Court of said Town of Juneau by the Magistrate thereof on the 5th day of March, 1915, a certified copy of which judgment is attached hereto, hereby referred to and made a part hereof the same as though it were set forth in full.

III.

That the Municipal Court of the Town of Juneau is a competent tribunal of criminal jurisdiction and that the judgment above referred to is a judgment duly and regularly issued according to law by said Court; and that [12] the said plaintiff was committed to the custody of this defendant on the 5th day of March, A. D. 1915, and has since been held by him in custody in the municipal jail of said Town of Juneau, Alaska.

WHEREORE defendant prays that the petition herein be dismissed and that he be allowed his costs.

J. H. WHEELER.

Subscribed and sworn to before the undersigned this 9th day of March, A. D. 1915.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires November 30, 1917. [13]

[Judgment of Municipal Magistrate.]

In the Municipal Magistrate's Court for the City of Juneau, Territory of Alaska.

No. 950.

Viol. of Sec. 2 of Ord. No. 27.

CITY OF JUNEAU,

vs,

BEN GIDO, *alias* BEN GUDEL (Italian).

March 5, 1915.

The above-named defendant is brought before me this 5th day of March, 1915, upon a sworn complaint signed by E. J. Sliter, charging him with the misdemeanor of vagrancy; the city being represented by Simon Hellenthal, Esq., and the defendant appearing without counsel. Upon the complaint being made known to the defendant he enters a plea of Not Guilty, and thereafter both sides being ready for trial, the following proceedings are had, viz.: John Ness, J. H. Gilpatrick, Ed Evans and E. J. Sliter are each duly sworn and testify on behalf of the city and the city rests, and thereafter the defendant and John Perreli and Dave Housel are each duly sworn and testify on behalf of the defendant, and the defendant rests, and thereafter both sides resting the Court finds

the defendant guilty and fines him in the sum of one hundred dollars, and orders that in case the defendant fails to pay the fine that he be required to serve one day in the Municipal Jail for each two dollars, of said fine not paid, and that during said confinement that the defendant be required to labor for the city under the direction of the Municipal Marshal.

Dated March 5, 1915.

[Seal of City of Juneau] E. W. PETTIT,
Municipal Magistrate.

United States of America,
Territory of Alaska,
City of Juneau,

CERTIFICATE.

I, E. W. Pettit, Municipal Magistrate of the City of [14] Juneau, Territory of Alaska, do hereby certify that that above is a full, true and correct copy of the Judgment in the cause of the City of Juneau vs. Ben Gido, Numbered 950.

Dated at Juneau, Alaska, this 9th day of March, 1915.

E. W. PETTIT,
Municipal Magistrate.

Filed in the District Court, District of Alaska, First Division. Mar. 9, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy.

[Endorsed]: Original. No. 1239–A. In the District Court for the Territory of Alaska, Division No. 1. Ben Guidoni, Plaintiff, vs. J. H. Wheeler, City Jailer of the Town of Juneau, Defendant. Hellenthal &

Hellenthal, Attorneys for Defendant. Office: Juneau, Alaska. [15]

[Title of District Court and Cause.]

Reply [to Return to Writ of Habeas Corpus.]

Comes now the above-named plaintiff and for his reply to the return to the writ of habeas corpus herein, shows to the Honorable Court:

That the proceedings referred to in defendant's return is the proceedings described in plaintiff's petition herein.

That the said judgment attached to the return was entered and filed subsequent to the issuance of the writ of habeas corpus herein.

That the complaint, a copy of which is attached to the petition, is the complaint upon which the said alleged trial was had, and upon which the said judgment was entered, and that the ordinance charged in said judgment as violated is the ordinance attached to the petition.

That said judgment is null and void, and of no force and effect for the reason set up in the petition.

JOHN RUSTGARD,
Atty. for Petitioner. [16]

United States of America,
District of Alaska,—ss.

Ben Guidoni, being first duly sworn, deposes and says: That he is the petitioner named in the above-entitled cause, and the foregoing reply is true to the best of his knowledge and belief.

BEN GUIDONI.

Subscribed and sworn to before me this 9th day of March, A. D. 1915.

[Seal] JOHN RUSTGARD,
Notary Public.

My commission expires the 14th day of September, 1918. [17]

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Mar. 10, 1915, 4.40 P. M. J. W. Bell, Clerk. By John T. Reed, Deputy. [18]

[Title of District Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED, that on this 9th day of March, being the time set for the return of the writ of habeas corpus heretofore issued herein, the plaintiff appeared in court in the custody of the defendant, and the hearing was proceeded with before Honorable Robert W. Jennings, Judge, under the following stipulations entered into by the respective parties and their counsel:

1. That the defendant is, and was at all times mentioned in the petition for the writ of habeas corpus, the jailer of the Town of Juneau, and that the answer filed herein on the 9th day of March, should be taken and considered as his return to the said writ of habeas corpus.

2. That at all of said times, E. W. Pettit was the Municipal Magistrate of the Town of Juneau, if the Common Council of the Town of Juneau had authority to appoint a municipal magistrate.

3. That the complaint of E. J. Sliter, copy of

which is set forth in the petition for writ of habeas corpus, and the judgment of said E. W. Pettit, copy of which is set forth in the answer herein, constitute the only authority to the said J. H. Wheeler to receive and hold the said petitioner in custody.

4. That the ordinance of the Town of Juneau, copy of which is set forth in said petition, was adopted by the Common Council of the [19] Town of Juneau, and is the basis upon which the judgment of said Pettit was founded.

5. No other or further evidence was presented to the Court and the only points relied upon by petitioner at the hearing to secure his discharge were the following:

1. That the Municipal Magistrate's Court of the Town of Juneau had no legal existence and had no authority to hear, try and adjudicate cases.

2. That the complaint did not state facts constituting an offense, or facts which the Common Council of the Town of Juneau had authority to denounce as crimes.

3. That the Common Council of the Town of Juneau had no authority to denounce vagrancy.

4. That the Town of Juneau had no authority to pass the ordinance in question.

5. That even if the Town of Juneau had authority to pass the ordinance in question and to constitute a police court, still the prisoner should be discharged because the ordinance itself is invalid for that the same is unconstitutional, discriminatory, arbitrary, indefinite, unreasonable and oppressive.

The Court having considered these points, took the

matter under advisement, and on the 18th day of March, rendered its decision, discharging said writ of habeas corpus and remanding the petitioner to the custody from whence he came, to which petitioner duly excepted.

Whereupon the petitioner, indicating that he desired to appeal from said order, asked the Court to grant a supersedeas, pending said appeal, of that portion of the judgment remanding petitioner to the custody from whence he came, and the Court, upon consideration, denied said application for want of authority to grant the same, to which petitioner excepted.

The foregoing bill of exceptions being true and correct is settled, allowed and signed as such.

ROBERT W. JENNINGS,
District Judge. [20]

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Mar. 24, 1915. J. W. Bell, Clerk. By ———— Deputy. [21]

[Title of District Court and Cause.]

Order Dismissing Habeas Corpus Proceedings, and Remanding Petitioner.

Oral Decision rendered, dismissing proceedings, and remanding Petitioner to the custody of the defendant, J. H. Wheeler, City Jailer of the Town of Juneau, Alaska.

Saturday, March 20, 1915.

ROBERT W. JENNINGS,
District Judge. [22]

In the United States Circuit Court of Appeals for the Ninth Circuit.

BEN GUIDONI,

Appellant,

vs.

J. H. WHEELER, City Jailer of the Town of Juneau, Alaska,

Appellee,

Assignment of Errors.

Comes now the above-named appellant, Ben Guidoni, and assigns the following errors as having been committed by the District Court of Division Number One, District of Alaska, at Juneau, in the proceedings in the above-entitled cause, upon which the appellant intends to, and does, rely in prosecuting his appeal herein.

1st. The Court erred in holding that the Municipal Magistrate's Court of the Town of Juneau was a legally constituted Court and had a legal existence, and had authority to hear, try and adjudicate cases.

2d. The Court erred in holding that the complaint in the Municipal Magistrate's Court, signed by E. J. Sliter, against the said Ben Guidoni, this appellant, stated facts constituting an offense.

3d. The Court erred in holding that the Common Council of the Town of Juneau had authority to denounce as crimes the facts charged in the complaint before the Municipal Magistrate's Court of the Town of Juneau, against this appellant, and signed by E. J. Sliter.

4th. The Court erred in holding that the Common

Council of the Town of Juneau, had authority to denounce vagrancy.

5th. The Court erred in holding that the Common Council of the Town of Juneau had authority to enact ordinance Number 27, and set out in appellant's petition. [31]

6th. The Court erred in holding that the said Ordinance was valid.

7th. The Court erred in holding that the appellant, the plaintiff below, was in the lawful custody of the appellee, the defendant below.

8th. The Court erred in holding that the judgment under which the defendant and appellee claimed the right to the custody of the appellant, was a lawful and valid judgment.

9th. The Court erred in discharging the writ of habeas corpus herein and remanding the appellant to the custody of this appellee.

10th. The Court erred in not holding that Section 2, of the said Ordinance #27, set out in plaintiff's petition, was unconstitutional, discriminatory, arbitrary, indefinite, unreasonable and oppressive.

WHEREFORE, Appellant, the plaintiff below, prays that the said judgment herein entered on the 20th day of March, A. D. 1915, be reversed.

JOHN RUSTGARD,
Attorney for Appellant. [32]

Copy of within Assignment of Errors received and due service of same acknowledged this 24th day of Mch, 1915.

HELLENTHAL & HELLENTHAL,
Attorneys for Appellee.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Mar. 24, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy. [33]

[Endorsed]: No. 2592. United States Circuit Court of Appeals for the Ninth Circuit. Ben Guidoni, Appellant, vs. J. H. Wheeler, City Jailer of the Town of Juneau, Alaska, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed April 1, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk. [34]

In the United States Circuit Court of Appeals for the Ninth Circuit.

BEN GUIDONI,

Appellant,

vs.

J. H. WHEELER, City Jailer of the Town of Juneau, Alaska,

Appellee,

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, that it shall not be necessary or required of the appellant to cause to be printed any

other records transmitted or certified by the Court, to the above-entitled court, except the following, to wit:

Petition for writ of habeas corpus.
Writ of habeas corpus.
Return and answer to writ.
Reply to return and answer.
Opinion of lower court.
Judgment and order remanding plaintiff.
Bill of exceptions, assignment of errors, and this stipulation.

PROVIDED, however, if at the time of the hearing of the above-entitled cause, the Court shall require other documents transmitted in said cause to be printed, it shall be the duty of the appellant to cause the same to be printed.

Dated April 12, 1915.

JOHN RUSTGARD,
Attorney for Appellant.
HELLENTHAL & HELLENTHAL,
Attorneys for Appellee. [35]

[Endorsed]: No. 2592. In the District Court U. S. Circuit Court of Appeals for the Ninth Circuit. Ben Guidoni, Appellant, vs. J. H. Wheeler, City Jailer of the Town of Juneau, Alaska, Appellee. Stipulation. Filed Apr. 21, 1915. F. D. Monckton, Clerk. [36]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1239–A.

BEN GUIDONI,

Plaintiff,

vs.

J. H. WHEELER, City Jailer of the Town of Juneau, Alaska,

Defendant.

Opinion on Application for Writ of Habeas Corpus.

JENNINGS, Judge.

The contention is made—

1. That the city had no power to establish the police court;

2. That the city had no power to declare what shall be a misdemeanor;

3. That even if those two positions are not well taken, yet the ordinance is void because it is partial, unreasonable and oppressive.

As to the first two points: With all due respect to the former Judge of the Court in the Second Division of Alaska to the effect that the Act of 1904 was a repeal of everything contained in the Act of 1903, I am constrained to differ from his conclusion.

In 36 Cyc., page 1081, Section 2, it is laid down that the doctrine "that a statute is impliedly repealed by a subsequent statute revising the whole matter of the first, does not apply where the revisory statute declares what effect it is intended [1] to have

upon the former, as where it provides that it shall repeal all inconsistent or repugnant acts. In such cases only such effect can be given to the revisory acts as it directs. The enumerated acts are repealed; the others remain in force," and there is a long list of cases cited in support of the text. The Court has not examined all of those cases to see if they bear the text out, but it has had occasion quite often to investigate the law on that subject and is satisfied that the text is well borne out by the authority. But irrespective of the statute of 1903, the fact that the Act of 1904 provides for a police magistrate and gives him jurisdiction of all violations of city ordinances, and the further fact that vagrancy is a well recognized subject of municipal regulation, would seem to point to the fact that ordinances on such subjects, if otherwise unobjectionable, are valid.

The Court has no doubt that the police court is a lawful institution, and it has no doubt that the city can, by proper means, protect itself against vagrants, but that in so doing it must take care that it do not commit a sin against the spirit of liberty and the rights of the citizen cannot be denied.

The city has power to pass by-laws within the limitations of its powers, but those limitations are well known and recognized in the law. They must be impartial, reasonable and not oppressive.

If this ordinance is void, no conviction based upon it can be sustained, and an application in habeas corpus would be the [1½] proper method to be pursued by one suffering restraint by reason of a judgment of which it is the basis; if the ordinance is not

void and the person is in restraint because of a defective complaint or insufficient evidence, habeas corpus will not lie—the party's remedy being by appeal or writ of review. For habeas corpus cannot be made to take the place of those remedies.

3 McQuillan, Sec. 1098.

This much is elementary. That brings us, then, to a determination of the question as to whether or not the ordinance is void.

In the effort to arrive at a correct determination of this question, regard must be had to a variety of conditions and circumstances well established as proper to be taken into consideration, on such an inquiry.

It will hardly be denied that in Juneau there ought to be (if there is not) an enforceable ordinance on the subject of vagrancy. Juneau is a seaport town and is growing rapidly; it is also the center of a rapidly developing mining district and the population is heterogeneous in the extreme. The town is overrun with people who, in the language of Blackstone, "woke on the night and sleep on the day, and haunt customable taverns and ale-houses and rout about, and no man wot from whence they come ne whither they go." Many willing workers have gathered in the town and the adjacent mining centers, seeking honest employment, and great numbers have not been able to find work, but following in the wake of expanding industry has also appeared a multitude of loafers, idlers and blood-sucking parasites who hang upon the flanks of decency and good order with a tenaciousness and destructiveness well nigh appalling. The population is constantly shifting, and some kind of

track and some kind of restraint and supervision are absolutely necessary.

There *is* some kind of regulation on the subject, and the consideration of such as there is, will be approached with a view of making it stand erect unless it shall be manifest that it must utterly fail of its purpose and be relegated to the limbo [2] of useless junk. So we begin with favorable inclinations toward any ordinance or regulation having for its object the extirpation, diminution or regulation of the evils under which we suffer.

It is well to bear in mind, too, that "Municipal government stands midway between the family and the state. It is an aid to both and partakes of the nature of both. Police ordinances are at once family rules on a large scale and state laws on a small scale."

McRea vs. Americus, 59 Ga. 168.

Also, that ordinarily the rigid rules by which the validity of penal statutes are to be tested are not applicable to the by-laws of municipal corporations. "The by-laws of very few of these corporations could stand such test. They should receive a reasonable construction and their terms should not be strictly scrutinized, for the purpose of making them void."

2 McQuillan on Mun. Corp., Sec. 814.

All doubts are resolved in favor of the validity of the ordinance. The presumption is in favor of the validity and the burden is upon the one who asserts its invalidity to demonstrate it.

Idem., Sec. 810, p. 1734.

Ordinances are to be construed in harmony with

the laws and general policy of the state.

2 McQuillan, Idem.

"Whether an ordinance be reasonable and consistent with the law or not is a question for the Court, and not for the jury, and evidence to the latter on this subject is inadmissible. But in determining this question the Court will have to regard all the circumstances of the particular city or corporation, object sought to be attained, and the necessity which exists for the ordinance. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated [3] town, or in the country."

1 Dillon Mun. Corp., Sec. 327.

C. & O. Ry. Co. v. City, 103 Ill. App. 251.

The ordinance in question denounces as vagrants, and provides for the punishment of, all persons falling within any one of the following descriptions, to wit:

1—Those persons within the corporate limits of the City of Juneau who have no visible means of living, or lawful occupation or employment by which to earn a living

2—Those healthy persons who are found begging means of support.

3—Those persons who habitually roam about the streets without any lawful business.

4—Idle or dissolute persons who live in or about houses of ill-fame.

5—Persons having no known occupation or business who shall be found wandering about the streets

of the City of Juneau after the hour of 11 o'clock at night.

An ordinance may be valid in some of its provisions and void in others; therefore it is not necessary to consider whether the entire ordinance is void, but only as to whether those portions of it which are pertinent to the case at bar are void.

(2 McQuillan, sec. 816, p. 1743.)

The only portions of the ordinance that are pertinent to the case at bar are those involved in the charge which underlies the judgment. That charge is referable only to the first and fifth classes of people mentioned in the ordinance.

The defendant is charged with being a man with no visible means of living, or lawful occupation or employment with which to earn a living. This charge is in the very words of the ordinance. He is also charged with "wandering about the streets of Juneau after the hour of 11 o'clock P. M. without a lawful occupation or business." Supposedly this means to charge a crime under the fifth classification appearing above, to wit: Wandering about the streets after the hour of 11 o'clock at night "having no known occupation or business." [4]

We will first consider the first sentence of this ordinance. The language used in that first sentence, to wit: "All persons having no visible means of support or lawful occupation or employment by means of which to earn a living" employs the words which have been used, time out of mind, to describe a vagrant—

And yet even a cursory reflection and analysis is

sufficient to demonstrate that not only are those words *not* sufficient to describe vagrancy, *but also* that many individuals worthy and unfortunate who are not reprehensible at all and whom it would be a misnomer, a slander and a gross injustice to call vagrants, would fall within the strict meaning of said words.

For instance: A person may have a lawful occupation and may have visible means of support, and yet he may be a vagrant on account of the fact that he will not work at his occupation and will not spend his own money to support himself, but prefers to wander around begging, or consorting with disreputables, or seeking whom and what he may devour, and making a general nuisance of himself.

Again—A man having no *visible* means of support is not necessarily a vagrant—He may have the wealth of Croesus and yet that wealth may not be visible; nor is a man who has no lawful occupation or employment by which to earn the means of living, necessarly a vagrant, for he may have plenty of money and yet no occupation. Nor is a man who is without visible means and is also without a lawful occupation or employment necessarily a vagrant, for as before said, although he have no lawful occupation and no lawful employment and no visible means, yet if he have enough *invisible* means to support himself he could hardly be taken up as a vagrant, if he have no *other* qualifications, whether he has or has not a lawful occupation or employment.

Again—A man may have no means of support, visible or invisible, and no occupation or employment

by which to earn the means of living, and yet not be a vagrant. He may be an honest laborer out of a job and destitute of means, yet looking for a job and [5] able and willing to work but unable to find any work to do. Such a man is not, and never has been held to be, a vagrant, and the language used to describe vagrancy has never been held to include him, and yet if the language be strictly construed he would come within its purview.

So, it appears the language used is too broad because it embraces those who may be innocent and worthy, and is too narrow because it fails to embrace all who come within the spirit of the term vagrant. Nevertheless, such language, although manifestly inapt, has, through all the years, been taken to describe a vagrant. This is because something which is not in the language has always been read into it, so that, considering as a part of the language what has been read into it, the language itself has come to have an artificial meaning, and that artificial meaning may be expressed thus: "Whoever is without means of support or lawful occupation or employment by means of which support can be obtained and who conducts himself in such a manner as to be a detriment to the peace and order, or offend the sense of decency, or shock the morals, of the community, is a vagrant."

This reading into a statute or an ordinance of things consonant to the spirit, although not found in the letter, is no new thing in construction—It is one of the well-known canons of construction. It is aptly expressed in the good book, "Not of the letter but of

the spirit; for the letter killeth but the spirit giveth life"; and the cases are too numerous to mention, where language has been construed to mean what the spirit signifies and not merely what the language imports—For instance: The language of the National Constitution is that no man shall be convicted of a crime except by the verdict of a jury. The Congress undertook to say that in Alaska in misdemeanor cases a jury of six was sufficient—A defendant in a misdemeanor case demanded a jury of twelve and upon that being denied him, took appeal. The Supreme Court of the United States read into the Constitution the words "a jury of twelve."

U. S. v. Rasmussen, 197 U. S. 516. [6]

The Court said in substance that what the Constitution makers must have meant was a jury of twelve—that that was the only jury they knew anything about—a common law jury.

The most notable of recent instances of reading things into the letter of the statute so that the spirit should shine forth, occurs in the opinion of the Supreme Court of the United States in the Standard Oil case. There the word "unreasonable" was read into the language "combination in restraint of trade," so that it is made to read "combination in unreasonable restraint of trade." This was justified by reason of the fact that in the light of history and past adjudications "restraint of trade" meant unreasonable restraint of trade—As said by the Chief Justice, "Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made

them. In the interest of the freedom of individuals to contract, this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation and was otherwise reasonable, the contract was held to be void." Therefore, construing it according to the rule of reason and in the light of history and attending circumstances, a statute which in words made unlawful all combinations in restraint of trade, came to mean *not* all combinations, but *only those* combinations which were not partial in their operations and which were otherwise reasonable. Here a whole clause was, by the spirit, supplied to the language.

Standard Oil Co. vs. U. S., 221 U. S. 1.

As further illustrating—a statute of the State of Washington provided that all places "where women are employed to draw custom and to dance" were nuisances and might be abated and the proprietors prosecuted. Now, it is perfectly evident that by a strict literal construction of that statute the promoter of exhibitions wherein Pavlova or Isadora Duncan or Loie Fuller [7] perform, would be in the same category as the keeper of a dance hall where women are employed to draw customers to the bar to take a drink after each performance. Certainly such was not the intention of the Legislature of the State of Washington. The spirit of the law was to discountenance and discourage only such exhibitions as were carried on in such a way as to shock the morals of the community. The case came up on appeal

(not habeas corpus). So the Supreme Court of the State read that meaning into the statute, saying:

> "It is further contended by the appellant that the information is fatally defective in not showing that the manner of 'drawing custom' and of dancing, for which the women are alleged to have been employed, was such as to shock the moral sense, or to interfere with the peace and good order of the community, or in any manner whatever to affect the community, or to constitute a nuisance. That portion of the information to which appellant's objection is directed follows the language of the statute, and is consequently sufficient, unless the words used are so general as to include cases not intended by the legislature to be included in the statute. If, therefore, women may, within the meaning of the statute, in any case lawfully be employed in any place of resort to draw custom or to dance, then the information should have stated facts showing that this was not one of those cases, notwithstanding the language of the law suggests no exception. It is the intention of the legislature that is to be determined in the construction of statutes, and in arriving at the intention it is sometimes necessary to restrict the meaning of the language used by the lawmakers so as not to include therein all that the words express. 'It is a familiar canon of construction that the thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter

of the statute is not within the statute unless it be within the intention of the makers.' Riggs v. Palmer (N. Y. App.), 22 N. E. Rep. 189. It was evidently the object and intention of the legislature, in passing the statute under consideration, to punish all persons engaged in any business which openly outrages decency and tends to corrupt the public morals, and not to condemn the employing of women, in all cases, even for the purpose of drawing custom and dancing, regardless of the effect thereof upon the community. At common law, all public shows of a scandalous and demoralizing character were nuisances, without regard to whether the persons participating therein were men or women, while theaters and other places of innocent amusement were favorably recognized. Taken literally, the language of our statute would authorize the punishment of all theatrical managers who open their doors, and permit the public to enter and witness the performance of even the greatest of female histrionic or terpsichorean celebrities; yet no one would for a moment consider that such was the intention of the legislature.******

We are therefore of the opinion that the information in this case should have gone further, and shown that the character of the women alleged to have been employed, or the manner of their deportment and quality and character of conversation, was such as tended to draw together crowds of disorderly persons, or to debauch the morals of those resorting to the place.

> Liquor selling is recognized by our law as a legitimate vocation, and we think that even a woman may be employed in a saloon without thereby necessarily rendering the place a 'nuisance,' within the meaning of the statute in question."
>
> State vs. Brosn, 34 P. R., 132. [8]

Says one author: "The ordinance will be construed according to its reason and spirit. A literal interpretation will be rejected if such would defeat its purpose. In construction words will sometimes be rejected. Words of an ordinance are construed the same as words of a statute. The legislative intent will control the construction of a word in an ordinance though the word is unappropriate."

2 McQuillan, p. 1741.

And so into this ordinance, words notwithstanding, there must be read the spirit of the law—there must be read the meaning which the words had originally and which through long years they have stood for and what they stand for now—there must be read into it all the tenor of our institutions, the conditions of society, the evils to be remedied, the ends to be accomplished, the general policy and history of the people, all the harmony of the law, and the common sense of our ancestors and of ourselves. There are many constitutions and statutes and ordinances which taken literally lead to glaring absurdities, but which, when read in the light of the spirit, are radiant with justice and benevolence and common sense.

Such an ordinance is this. Reading the spirit and not the letter, there is no difficulty. The indigent but unemployed honest man has nothing to fear from

it—It is not aimed in his direction. It never was aimed in his direction—It will not hit him except by inadvertence—It is true that under it mistakes may sometimes be made and the innocent suffer—But when was this otherwise? At what stage of the world's history was it that human institutions became infallible—in what decade have mistakes not been made? And he who would devise a scheme by which the innocent will *never* suffer for the sins of others deserves and will receive "a monument more lasting than brass and higher than the royal altitude of the pyramids." Many an innocent man has been hanged for a murder which he never committed—Shall we, on that account, abandon all prosecutions [9] for murder? Many a man has been sent to prison for another man's crime—shall we, on that account, abolish all the jails?

It is true that under the strict letter of this ordinance an honest working man may sometimes suffer but shall we, on that account, give over the city to pimps, macques, harpies, loafers, petty thieves and leering mashers?

If the ordinance is read according to the strict letter, such an alternative might arise, but if it be read according to its spirit no such dilemma confronts us. Read according to its spirit, the honest man is as safe as he ordinarily is under our necessarily defective institutions, and it is only the parasite and the degenerate who needs slink out of sight at the approach of the officers of the law. Such men, when apprehended, are always the first to invoke those principles of law and liberty which they habitually

despise and disregard. Such is "the homage which vice pays to virtue."

All good citizens must take their chances—They have to take them as to all other prosecutions. Each is liable to be arrested on any charge and to be tried before a jury, to ascertain whether or not he has committed the crime with which he is charged; sometimes, no doubt, a worthy citizen will be unjustly arrested or convicted under this ordinance, but the ordinance is not on that account alone to be held void.

An ordinance may be too comprehensive in its provisions and cover cases which the city has no power to control, but that is no reason why courts should refuse to enforce it in cases over which the jurisdiction of the local corporation is unquestioned.

An ordinance operating unreasonably and oppressively in particular cases only, may be enforced except in such cases.

An ordinance that may operate reasonable in some instances and unreasonable in others is not wholly void and will not be set aside in toto.

87 Atl. 463.

The reasonableness is not to be tested by application to [10] extreme cases.

29 N. E. 1146.

28 Pa., 258.

The Court therefore holds that this ordinance is not void. When certain things are shown in evidence, the letter of the ordinance will not apply, because the spirit will kill the letter; in such cases the defendant will not be held to have violated the ordinance and cannot legally be punished. It may be a fact that

the petitioner in this case has not violated the ordinance; the court which tried him, however, says that he did. That Court heard the evidence. This Court cannot, without hearing evidence, say that he did not violate the ordinance. Let him appeal, as he has a right to do—On such an appeal it will be determined whether or not the facts shown in evidence expose him to the sanction of the ordinance as read in letter and spirit.

Petitioner having been charged with doing the things prohibited by that sentence of the ordinance which we have been considering, and having been found guilty, it will be unnecessary to advert to the question as to whether or not he could be held had he been convicted only under the fifth classification of persons deemed to be vagrants.

Cases have been cited by the learned counsel for petitioner in which convictions have been annulled when made on ordinances more or less similar to that in question here. In each instance but one, the case came up on appeal and the Court decided that, as applied to the evidence in the particular case under consideration there, it would be unconscionable to sustain the conviction because, as so applied, the ordinance was discriminatory, or unreasonable or oppressive or open to some other cogent objection appearing in the proceedings. But we have seen that each case stands upon its own footing and that "the reasonableness is not to be tested by application to extreme cases."

Only one of the cases cited by counsel for petitioner was on habeas corpus—that was in re Frasee—

the Salvation Army [11] case, and the reason the ordinance in that case was held void was because the common council had delegated to an individual, the Mayor, the sole power, the arbitrary power, the unappealable power, to say who should and who should not parade the public street—no rules had been prescribed—the whole matter was left to the whim of one man, and to parade without that one man's permission was a misdemeanor. He could give or withhold his permission as favor, anger, hatred, or caprice dictated—no wonder the writ of habeas corpus was granted.

The proceedings are dismissed, and petitioner remanded to the custody of the City Jailer.

[Endorsed]: No. 1239–A. In the District Court for the District of Alaska, Division No. One. Ben Guidoni, Plaintiff, vs. J. H. Wheeler, City Jailer of the Town of Juneau, Alaska, Defendant. Opinion on Application for Writ of Habeas Corpus. Filed in the District Court, District of Alaska, First Division. Mar. 20, 1915. J. W. Bell, Clerk. [12]

[Title of District Court and Cause.]

Praecipe [for Certified Copy of Opinion].

To the Clerk of the Above-entitled Court:

Please transmit to the Circuit Court of Appeals of the Ninth Circuit at San Francisco a certified copy of the Court's opinion in the above-entitled cause.

Respectfully,

JOHN RUSTGARD,

Attorney for Plaintiff and Appellant.

[Endorsed]: No. ——. In the District Court, Division No. 1, Territory of Alaska. Ben Guidoni, Plaintiff, vs. J. H. Wheeler, City Jailer of the Town of Juneau, Alaska, defendant. Praecipe. John Rustgard, Attorney for Plaintiff and Appellant. Filed in the District Court, District of Alaska, First Division. Apr. 4, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [13]

[Title of District Court and Cause.]

[Certificate of Clerk U. S. District Court to Certified Copy of Opinion.]

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, do hereby certify that the above and foregoing twelve pages of typewritten and written matter, numbered from 1 to 12, both inclusive, constitute a full, true and correct copy, and the whole thereof, of OPINION ON APPLICATION FOR WRIT OF HABEAS CORPUS, in Cause No. 1239–A, wherein Ben Guidoni is Plaintiff and Appellant and J. H. Wheeler, City Jailer of the town of Juneau, Alaska, is Defendant and Appellee, as called for in the Praecipe of Appellant, copy of which is attached hereto and made a part hereof.

I further certify that said copies of Opinion and Praecipe were prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Seven Dollars and Ten Cents ($7.10), has been paid to me by John Rustgard, Attorney for Plaintiff and Appellant.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the above-entitled court, at Juneau, Alaska, this 15th day of April, 1915.

[Seal] J. W. BELL,
Clerk of District Court, Dist. of Alaska, Division No. 1.

[Endorsed]: No. 2592. United States Circuit Court of Appeals for the Ninth Circuit. Ben Guidoni vs. J. H. Wheeler, City Jailer of Town of Juneau, Alaska. Certified Copy of Opinion of Jennings, D. J. On Application for Writ of Habeas Corpus. Filed Apr. 21, 1915. F. D. Monckton, Clerk.